***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-1324

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P/S

To be argued by
ROY M. COHN

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

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UNITED STATES OF AMERICA,

Appellee,

- against -

JACK G. SCHWARTZ and GEORGE SARKIS, a/k/a "George,"

Defendants-Appellants.

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ON APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLANT SCHWARTZ

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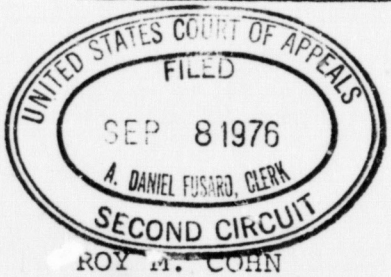


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## ISSUES PRESENTED

1. Is a reversal of the conviction of appellant on the only count on which he was not acquitted by the jury mandated by the prosecutor having, without any factual foundation whatsoever, suggested in a question propounded in front of the jury that the appellant was connected with "The Mafia"? On all fours, United States v Love, 75-1984, 21 Cr. L. 2167 (6th Cir. May 5, 1975).

2. Was the court below correct in pegging the refusal to declare a mistrial on the premise that the prosecutorial misconduct occurred when the trial was well underway, rather than close to its commencement?

3. Under the facts herein, and in light of the court's charge on conspiracy and aiding and abetting, is not reversal of appellant's conviction for having aided and abetted required in view of his acquittal on the conspiracy count, and the failure of proof to support an aiding and abetting conviction?

4. Do the facts embodied in this record and the transactions which are revealed fall within the proscription of 18 U.S.C. §894 as they concededly concern the activities of a non-underworld legitimate businessman?

## STATUTE IN QUESTION

Title 18 U.S.C. §894

Collection of extensions of credit
by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

## PRELIMINARY STATEMENT

Appellant Jack Schwartz (hereinafter sometimes referred to as "Schwartz") was indicted in a three-count indictment charging violations of 18 U.S.C. §894, the anti-loan-sharking statute. The indictment charged a §894 conspiracy and two §894 substantive crimes. After trial before the Honorable Jacob Mishler, Chief Judge of the United States District Court for the Eastern District of New York, and a jury, Schwartz was acquitted of the conspiracy count and one substantive count, but convicted of the remaining substantive count.*

Schwartz was sentenced to three years imprisonment, thirty-three months being probated and the balance to be served in prison, and a $10,000 fine.** It is from such judgment of conviction that this appeal is taken.

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* A co-defendant, George Sarkis ("George"),was similarly indicted and convicted.

**George was sentenced to three years imprisonment.

## BACKGROUND

Schwartz was President of Gaines Service Leasing Corp. ("Gaines"), located in Brooklyn (Tr. 2368-2369).* Gaines, one of the leaders in the leasing industry, leased automobiles, boats, airplanes, manufacturing equipment, and, beginning in about 1973, entered the truck rental field (Tr. 2392).

Gaines would either (1) purchase and take title to a particular new vehicle desired by a truckman and lease it to such truckman at a fixed monthly rate, or (2) purchase, for an agreed price, a truck already owned by a truckman (who needed operating funds) and lease it back to such truckman at a fixed monthly rate.

In either situation described above, the truckman would pay Gaines at a fixed monthly rate and, for a nominal sum at the end of the lease period, have the opportunity to take title to the vehicle.** As one would expect, Gaines made provisions in the event of defaults by the lessees. Gaines used the services of a man named Grove Ebbert ("Ebbert") to handle repossessions if they were necessary.***

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* References beginning with Tr. refer to pages of the trial transcript. References followed by "a" refer to pages of Schwartz's Appendix.

** There is no claim by the government that any part of these transactions were illegal or usurious. Gaines discounted the paper with Manufacturers Hanover Trust and other banks which extended lines to it. (Tr. 302-303)

*** There is no claim by the government that there is anything illegal about repossessions.

The events in this case revolve around the activities of three professional truckmen, Jack Taylor ("Taylor"), Fred McGhee ("McGhee"), and Victor Mignoli ("Mignoli"). All three knew each other and all three became lessees of Gaines. Taylor had, in addition, introduced Ebbert - the repossessor - to Gaines (Tr. 711-712).

The charge was that Schwartz used extortionate threats against Taylor and McGhee.

Not to argue sufficiency at this point, but to demonstrate the closeness of the case, and the poison of the "Mafia" suggestion by the prosecutor, the proof showed Schwartz to have an unblemished business and community record. Having started at age 10 as a porter, he worked his way to the ownership of substantial and highly regarded businesses, was a pioneer in industry organization, and a founder and director of the Kinney system (Tr. 2366-2367). His character reputation was testified to by the Borough President of Queens County where he does business, customers who have dealt with him over the years, and community leaders (Tr. 2372-2390). Prior to indictment, the prosecution subpoenaed the names and addresses of every Gaines customer, and sent F.B.I. agents swarming around in search of other instances of alleged threats for non-payment. They found not one among hundreds of customers (Tr. 314)* The charge in this case and the consequent publicity caused cancellation of Gaines' bank lines, the forced sale of appellant's automobile agency, and financial disaster (Tr. 2369).

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* The trial court, we believe, improperly refused to allow proof of this under Brady or any other theory. We assign this as error.

On the other hand, there are the complainants, Taylor and McGhee. McGhee's credit application to Gaines was concededly false from top to bottom (105a - 115a), he dead-beated creditors from banks to other leasing companies as a routine matter, through bounced checks, lies and fraud (116a - 117a, 120a - 124a, 125a & 139a). Taylor was a friend of his, with a long history as a "con man". When they selected Gaines and Schwartz as their next financing victim, McGhee described the ease of the extraction in that the application he filled out "didn't really mean anything" (109a) and "was not check[ed] at all (114a). The jury acquitted on the Taylor count, and the conspiracy.

## STATEMENT OF FACTS

During the periods of their respective leases, Taylor and McGhee followed their usual pattern of bounced checks and delinquent payments. It also developed that the equipment they had sold to Gaines was invariably defective, with resultant customer complaints to Gaines about the misrepresentations made by Taylor and McGhee. Gaines made good for repairs in many instances although not its responsibility (Tr. 2399 - 2400). Gaines' requests for payment or return of the vehicles were ignored.

Early in 1975, truckman Mignoli advised Schwartz and Gaines' controller, Sy Roth, that McGhee had threatened to shoot anyone from Gaines who attempted to either repossess the leased equipment or collect the money owed on it (Tr. 17 99). In addition, Mignoli knew McGhee had a gun (Tr. 1635).

Repossessor Ebbert had trouble collecting payments from McGhee on prior occasions (Tr. 804). Schwartz was apprehensive about Ebbert's relationship with Taylor (Tr.2447).

Thus, in the spring of 1975, Schwartz related his difficulties in obtaining payment from McGhee and Taylor to his friend, Jack Cohen* (Tr. 2443-2447). Schwartz recounted the possibility of violence on McGhee's part and his uneasiness with the Ebbert-Taylor relationship (Tr. 2447).

Jack Cohen told Schwartz of George, a Puerto Rican who had acted as a bodyguard for Cohen's elderly father during

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* head of a prominent textile corporation.

a strike at Cohen's factory in Puerto Rico several years before (Tr. 909-910).

Cohen contacted George and asked that he come to New York to accompany Ebbert (Tr. 913a). The purpose was twofold: (1) to protect against possible violence from McGhee and (2) to insure that Ebbert would not let his prior relationship with Taylor interfere with his responsibilities to repossess or collect for Gaines (Tr. 2447).

On April 21, 1975, George arrived from Puerto Rico and was met at the airport by Cohen and Schwartz. Cohen had arranged for the flight and gave George $500-$600 upon his arrival (Tr. 919). Schwartz registered George into the Golden Gate Hotel in Brooklyn openly using a Gaines American Express card. Schwartz, not recalling George's surname, registered him as "George Schwartz" (Tr. 2445).

Cohen told George to go with Ebbert to protect him and nothing more (Tr. 918). Ebbert arrived at the hotel to meet George. Then there began a bizarre series of events, over which Schwartz had no control or even knowledge. George and Ebbert went on a drunken binge, ending up in Times Square flop-houses, under the aegis of a series of ladies of the evening, who successively relieved George of his cash while he was sleeping.*

After being up all night on the binge, on the morning of April 22, Ebbert and George visited Taylor and McGhee at their homes. McGhee testified that he detected alcohol on George's breath** (41a)

* This was obviously prior to the City's pre-convention elimination of all such temptations.

** We omit the substance of any conversations with Taylor since the jury acquitted George and Schwartz of charges of use of extortionate threats against Taylor.

McGhee testified that Ebbert said McGhee's legs would be broken (39a). However, it was Ebbert, who at the time of the trial had taken a plea, who testified for the prosecution, but denied this and flatly contradicted the other Government witness, McGhee (Tr.760).

On April 23, George visited Schwartz at Gaines, had lunch, reported that apparently there would be no trouble and that his services were not needed and was instructed by Schwartz to go back to Puerto Rico (Tr. 2550).

George went back to his hotel. Ebbert was to deliver George to the airport that night. The two men decided to resume their drinking binge and throughout that afternoon and evening consumed alcohol ranging from ten to fifteen drinks apiece. Later that evening a fire was set to McGhee's garage. At the trial Ebbert said George did it, and George said Ebbert did it (Tr. 785, 2210). Both agreed Schwartz never suggested any such thing, and that it evolved from the drunken conversation at the bar.

Immediately after the fire George returned to Puerto Rico. Schwartz never saw George or spoke to him thereafter until this indictment was returned (Tr. 2553).

Schwartz, Ebbert and George were indicted for (1) conspiracy, under §894, to use extortionate means to collect extensions of credit against Taylor and McGhee; (2) use of such extortionate means against Taylor; and (3) the use of such extortionate means against McGhee. Jack Cohen was not named in the indictment as either a defendant or a co-conspirator. Gaines' controller, Sy Roth, was named only as a co-conspirator.

At the trial Taylor and McGhee testified as to certain body recordings they made for the police and F.B.I. without the knowledge of Schwartz. They also testified that they still have not paid Gaines what they owe on their leases, nor does Gaines have possession of their equipment (Tr. 546, 675, 1389, 1391). Indeed, after Schwartz' arrest, Taylor - against the prosecutor's advice - went back to Schwartz and ripped him off for another $3,800 of which he has never repaid a penny (Tr. 1385 - 1386). Schwartz, as George, was acquitted of conspiracy and the "Taylor Count", but was convicted of the remaining "McGhee Count".

The tapes are replete with the tapers baiting Schwartz into losing his temper, and exploding (Tr. 2573). The trial testimony showed that when baited, Schwartz loses his cool, and uses the usual pithy language that might be familiar to one in such a situation. It also showed that in a lifetime business, Schwartz had never hurt anyone in any way (Tr. 2411), and that those who knew him as did Taylor and McGhee, knew the bark rather than being followed by a bite, quickly gave way to total helpfulness in working out the problems of even dead-beats such as Taylor and McGhee (Tr. 1347, 181a - 182a).

The poison in this trial was the garage fire involving co-defendant Sarkis, which in no way was Schwartz' doing (Tr. 806), and the prosecutor's suggestion in a question before the jury that Schwartz was connected with "The Mafia". (Tr. 1836)

## POINT I.

### THE IMPROPER REFERENCE TO THE MAFIA BY THE PROSECUTOR MERITED A MISTRIAL AND WARRANTS A REVERSAL OF THE CONVICTION.

The prosecutor listed Mignoli who had been involved in similar leasing and equipment activities with Gaines, Taylor and McGhee. When it rested without having called Mignoli, the defense called him to the stand (Tr. 1632). It was Mignoli who first introduced Taylor to Schwartz (Tr. 1632).

The prosecution had produced and offered tapes of telephone conversations between Taylor and Mignoli (Tr. 1276). In one of these during the spring of 1975, Taylor, discussed his indebtedness to Gaines. Taylor taped that conversation in which Mignoli endeavored to convince Taylor to honor his obligations to Gaines, as Mignoli felt responsible in that he had brought Taylor there (Tr. 1722). There is no proof that Schwartz authorized Mignoli to attempt to persuade Taylor to honor his obligations or had any awareness whatsoever of this or any telephone conversation between Taylor and Mignoli.

In this conversation, Mignoli, prodded by Taylor, indulged in all kinds of fanciful tales about Schwartz' power, influence, and menacing potentialities. On the stand, Mignoli conceded these were figments of his imagination, in an attempt by him, Mignoli, to get Taylor to stop defrauding Gaines (Tr. 1712- 1733). This was obviously treated by the jury as of the same quality as Schwartz' explosions when Taylor provoked him - as the jury acquitted on the Taylor count.

But an entirely new and poisonous element was injected into the trial. It came not from a source of shaky credibility such as Taylor and Mignoli. It came from the prosecution.

Seizing upon a line on the tape where Taylor asked Mignoli who Schwartz is "connected with", the prosecutor insistently pursued a series of questions as to what this meant, and dissatisfied with the witness's answers, finally lowered the boom by asking:

> "Isn't it a fact that being connected is common parlance for being connected with the Mafia". (Tr. 1836)

At no point in the evidence, on or off the record, was there ever any factual basis or even insinuation for such a connection on Schwartz' part. And the comment involved was made between two third parties out of the presence of the appellant. When the prosecutor, who obviously had credibility with the jury, prefacing his question with "Isn't it a fact", injected "The Mafia", a mistrial was required.

The exact colloquy is as follows: (Tr. 1836)

> "Q (by prosecutor) Now, Mr. Mignoli, when Jack Taylor asked you who Jack Schwartz is connected with, what did you understand <u>him</u> to mean?
>
> "A (by Mignoli) Who he did business with, I guess." (Emphasis supplied.)*

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* The definition of the word "connect" includes: "join in some business or interest." <u>Thorndike-Barnhart Comprehensive Desk Dictionary</u>, Co. 1967 pp. 188-189.

Not satisfied, the Assistant pressed on:

> "Q Is that what you understand it to mean when someone is connected?
>
> "A Yes." (Tr. 1836)

The Assistant then proceeded to level the blow that sent shockwaves through the courtroom:

> "Q ISN'T IT A FACT THAT BEING CONNECTED IS COMMON PARLANCE FOR BEING CONNECTED WITH THE MAFIA?
>
> "A I have no idea." (Tr. 1836)(Emphasis added.)

The defense counsel objected to the question. Judge Mishler sustained the objection, struck the question and directed the jury to disregard it (Tr. 1836).

Defense counsel thereafter moved for a mistrial:

> "MR. COHN (Counsel for Schwartz): Your Honor, I just want to make a brief motion in connection with the -- I didn't want to do it in front of the jury -- in connection with Mr. Kimelman's Mafia business, and of course, the cross-examination.
>
> "THE COURT: Yes, that bothered me when I heard it." (313a) (Emphasis added.)

The Court continued, obviously in distress:

> ". . .[M]y reaction was, my God, after all, after two weeks, is this going down the drain because of the question like that, a meaningless question like that?" (313a)
>
> * * *
>
> "THE COURT: I don't know why. Well I think that an assistant that does that at least without checking with the Court is like a bull in a china closet. You don't care, you are just going to ask the question that you think is going to have an effect." (313a)
>
> * * *

"If there is a conviction, it is a point that you will have to defend very vigorously because I can tell you very frankly that I questioned the appropriateness of it." (314a)

* * *

"Judge Friendly once said in a case in which he spent about three pages affirming the opinion and then for about fifteen or twenty pages he wrote a treatise on why prosecutors bring in collateral matters. He said the proof [of guilt is] overwhelming and look at the collateral matters that the prosecutor brought in. Why do they do that, why do they risk a guilty verdict because they make it a little more solid or possibly like it to be dramatic -- and I don't say you did it for that reason but sometimes I wonder." (323a) (Emphasis added.)

Judge Mishler denied the motion for a mistrial and stated:

"I doubt in the context in which the question was asked that it was prejudicial, and I am going to deny it, and again, I feel constrained to do it, but I had thought if that had happened at the outset I may very well have declared a mistrial." (314a-315a)

It is respectfully submitted that the court below erred in denying the motion for mistrial. The fact that the question was asked after two weeks of trial should not have been a factor ( 313a ). If prejudice occurs, what difference does it make when it occurs? If a prejudicial summation can warrant a mistrial, so too can an intemperate and inflamatory question asked two weeks into a trial.

The court below recognized that the question was "meaningless"( 313a ) and such characterization necessarily belies any attempt to justify posing it. The Court further articulated its chagrin by advising the Assistant that his defense of the issue would have to be a vigorous one in this Court ( 314a ).

Furthermore, the inappropriateness of the question is underscored by the context in which it was posed. It must be noted that it was Taylor who used the word "connected" and Mignoli was asked what he understood Taylor to have meant. Mignoli used a proper and accurate definition of the word.

When Mignoli was then asked whether his definition was in accord with his own understanding of the word, he answered, "yes." (Tr. 1836)

Clearly the Assistant was not then justified in throwing out his own definition of the word in front of the jury.

Was there any foundation laid that Schwartz had instructed Mignoli to tell Taylor that Schwartz was connected with the Mafia? No.

Was Mignoli qualified as an expert in the jargon of the underworld who could testify as to what two mobsters were really saying to each other? No.

Judge Mishler's concern for aborting any trial in progress is understandable from an administrative viewpoint. But it was Judge Mishler who said the question was "meaningless" and "is this going down the drain because of the question like that. . ." (313a)

The answer is obvious. An argument by the appellee that the question was not prejudicial, or was cumulative in views of other language, is untenable factually as well as legally. If it were all that unimportant, why did the prosecutor so insistently inject it in front of the jury, without even disclosing his intention to the court in advance? Throughout the trial, the court frequently passed on such matters at the request of both sides out of the presence of the jury.* The prosecutor who consciously did this and regarded it as sufficiently significant to do in a close case, cannot now slough off its consequences.

What did the Court mean when it stated to the Assistant, "You don't care, you are just going to ask the question that you think is going to have an effect." ( 313a ) What effect?

This Court is respectfully referred to the recent case of United States v. Love, 75-1984, 21 Cr.L. 2167 (6th Cir. May 5, 1976). The similarities between Love and the instant appeal are striking. In Love, the defendant was charged in a six count indictment with violating 18 U.S.C. §875(c) in that he had transmitted a communication in interstate commerce, which communication contained a threat to injure another person unless a debt was paid. Love was convicted of

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* Although we respectfully disagree with certain of Judge Mishler's rulings, fairness requires us to acknowledge that he presided with particular patience and courtesy.

two counts and acquitted of the remaining counts.

The prosecutor asked Love on cross-examination: "National Account System [Love's employer - a collection agency] is not part of another organization, was it, of ill character like the Mafia or anything like that?" Defense counsel's objection was sustained and the following occurred in open court:

> "THE COURT: What possible excuse have you got in this case for suggesting there was some connection with the Mafia?
>
> "MR. DANA: (the prosecutor) I didn't. I said they were not part of it
>
> "THE COURT: The objection is sustained. Even the suggestion is out of line. Objection is sustained.
>
> "MR. JACKSON: (defense counsel) I would like a side bar.
>
> "THE COURT: No, it is obviously so irrelevant to this lawsuit I am sure the jury will totally disregard it. Go ahead. I won't grant a mistrial but I would caution the governmentnot to be too aggressive either. You are accusing this man [the defendant] of being aggressive and when you -- you understand what I am saying exactly. Continue with your questioning."

Even this strong admonition to the prosecutor in open court did not satisfy the Sixth Circuit, which held:

> "Although there is sufficient evidence from which the jury could find that the appellant communicated threats of injury, as charged in the two counts in which the appellant was found guilty, reversal is required because the prosecutor intentionally and for no proper purpose interjected into the trial the spectre of organized crime and the Mafia. This prosecutorial misconduct by itself, requires reversal of appellant's conviction.

* * *

"Although the district judge made a valiant effort to neutralize the prejudice interjected by the government attorney, we believe that since the jury found appellant not guilty of four counts of the indictment, and since the evidence is susceptible to an interpretation of innocent behavior, we cannot regard the prejudice as harmless. Due process does not require perfect trials, but it mandates fair ones."

A comparison of Love and the instant case is compelling:

| Love | Schwartz |
|---|---|
| (1) indictment charges threat related to debt collection | (1) indictment charges attempted extortionate collection of credit |
| (2) acquittal on 4 of 6 counts | (2) acquittal on 2 of 3 counts |
| (3) introduction of Mafia by prosecutor into proceedings | (3) introduction of Mafia by prosecutor into proceedings |

Love result: (4) reversal of conviction based soley on Mafia reference.

Indeed, we would submit that the prejudice in the instant case was more severe than in Love. In Love, the question was whether or not National Account System was part of the Mafia, wherein in the instant case, the direct implication was that Schwartz was part of the Mafia. In Az Din v. United States, 232 F.2d 283 (9th Cir 1956), cert. den., 352 U.S. 827, the Court stated a reversal would be justified where the intemperate remarks of a prosecutor were such that the jury could not put them out of its mind when merely advised to do so. Cf. Hanford v. United States, 249 F.2d 295 (5th Cir. 1957).

As can be seen from Love, a reference to the Mafia is such a remark as cannot be cured by mere instructions.*

It is well settled law that the defendant is entitled to a fair and impartial trial. Graves v. United States, 150 U.S. 118 (1893); Wilson v. United States, 149 U.S. 60 (1892); Hall v. United States, 150 U.S. 76 (1893). This is concomitant with a defendant's constitutional due process rights under the Fourteenth Amendment. The bounds of propriety and fairness which should characterize the conduct of a prosecutor in the prosecution of a criminal offense, are clearly set forth in Berger v. United States, 295 U.S. 78 (1934). In short, while a prosecutor is at liberty to strike hard blows, he is not at liberty to strike foul ones.

It should be obvious that prosecutorial inferences that a defendant is associated with the Mafia or organized crime are extremely prejudicial to the defendant. Indeed, what could be more chilling? In ordinary everyday usage, the term "Mafia" is highly inflamatory. This is particularly true in

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* In Love, the Sixth Citcuit simply "Reversed" the lower court rather than using the normal "Reversed and Remanded." After reversal, Judge James Churchill of the United States District Court for the Eastern District of Michigan, Southern Division, dismissed the indictment, saying that because of the simple "reversal," he felt that the Court of Appeals was indicating such a strong dislike for the tactics of the prosecutor that he was constrained to make an example of the Love case and dismiss it outright.

light of the massive number of books, articles, movies, and TV shows concerning criminal elements in present-day American society, including the so-called "Mafia." Thus, in raising the spectre of guilt by association the defendant was severely prejudiced by such insinuations.

We are not faced with a situation in which the proof of the defendant's guilt was overwhelming. Indeed, the jury had acquitted both defendants of the other two counts. Hence, when a case is close, as here, prosecutorial misconduct has a significantly stronger effect. Berger v. United States, supra.

A mistrial must be granted where necessary to prevent a miscarriage of justice and in view of appellee's conduct.* United States V Heath, 260 F. 2d 623 (9th Cir. 1958); United United States V American Radiator and Standard Sanitary Corp., 433 F. 2d 174 (3rd Cir. 1970), Cert. den., 401 U.S. 948.

We submit that in this case the misconduct was such as mandates a reversal of the conviction.

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* This was not the only instance of prosecutorial impropriety in the presence of the jury. During the direct examination of this same witness, the prosecutor arose, and before the jury, demanded that the court inform the witness to "seek the advice of counsel" (Tr. 1722). The prosecutor subsequently apologized. (316a)

## POINT II.

THE JURY'S VERDICT OF GUILTY AS TO COUNT TWO WAS AGAINST THE WEIGHT OF THE EVIDENCE AND IN CONTRADICTION TO THE CHARGE OF THE COURT.

The evidence as presented to the jury does not support the conviction of Schwartz as to Count II (the McGhee Count). That Schwartz had absolutely nothing to do with the fire* or any violence can be readily discerned from Judge Mishler's charge to the jury:

> "There is no proof in the record that the defendant Schwartz instructed Sarkis or anyone else to burn McGhee's garage or take any specific action or that he was aware of any plan to commit that act of violence or any other act of violence". (384a-385a)
>
> * * *
>
> "..[T]here is no proof whatever that Mr. Schwartz knew, was aware, that either Ebbert or Sarkis would commit arson, set fire to McGhee's garage. There is no proof that he knew of any specific conversation that either Ebbert or Sarkis would indulge in the use of violence that might be considered an extortionate threat". (390a)

Thus, there remained only two additional theories under which the jury could have concluded that Schwartz was guilty of Count II:

1. That Schwartz himself made threats to McGhee;

- or -

2. That Schwartz aided and abetted either Ebbert or George who made threats of physical harm to McGhee.

There is absolutely no proof in the record that Schwartz himself threatened McGhee. The only conversation

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*which followed the drunken binge of Sarkis and Ebbert.

between Schwartz and McGhee occurred on May 2, 1975, ten days after the fire at McGhee's garage.

The indictment charged that Ebbert, George and Schwartz violated 18 U.S.C. §894 "in collecting and attempting to collect extensions of credit from Fred McGhee by expressly and impliedly threatening Fred McGhee with the use of violence . . . and thereafter using violence and other criminal means."(7a) (Emphasis supplied.)

It is without question that McGhee's garage was burned on April 23, 1975. Since the indictment charges that the violence occurred after the threats, the threats must have occurred before April 23, 1975. Schwartz had no conversation with McGhee about indebtedness until May 2, 1975.

As to aiding and abetting Ebbert or George in threatening McGhee with the use of violence, the record is barren as to any words spoken by Schwartz as stating or necessarily implying the use of violence against McGhee. As to any argument that Schwartz wanted to put a scare into McGhee, we submit that being apprehensive or scared is not synonomous with the use of physical violence.

As to any threats made to McGhee by Ebbert or George, the two government witnesses who testified about it were directly in conflict (39a, Tr.760). In any event, those words were never attributed to Schwartz by anyone.

Significantly, the jury found Schwartz not guilty of the conspiracy count. This, we submit, must vitiate the notion that the jury could properly have convicted Schwartz of aiding and abetting Ebbert and/or George as to McGhee. The Court charged:

> "The crime of conspiracy sounds like aiding and abetting, and in trying to distinguish the difference between one who aids and abets and one who willfully participates in a crime himself, or in a conspiracy where he fully enters a conspiracy and helps it along, sounds almost like the same definition. But the significant difference is a theoretical one, a conceptual one . . . It is difficult to explain the practical difference, so I warn you of that at this point before I tell you what a conspiracy is." (379a-380a)

The indictment charged that Schwartz had conspired as against McGhee and Taylor. However, the court below charged the jury that they could convict Schwartz of conspiracy if they found him guilty of conspiracy as to McGhee or Taylor. ( 391a ). By charging in the disjunctive, the Court, in effect, told the jury that they could convict Schwartz if they found him guilty of conspiring as to either debtor. It is axiomatic that the jury, by its oath, must accept the law as charged by the trial court. Corson v. United States, 147 F.2d 437 (9th Cir. 1945). By virtue of the acquittal on the conspiracy count and the charge of the Court, the jury could not find Schwartz guilty of aiding and abetting.

In summary of this issue, the indictment charged the defendant with the use of extortionate means:

(1) by expressly and impliedly threatening the use of violence; and thereafter

(2) actually using violence.

The charge of Judge Mishler and the evidence clearly demonstrated that:

(1) Schwartz did not set the fire;

(2) Schwartz did not authorize or instruct the implementation of a fire or of violence;

(3) Schwartz did not authorize any specific action;

(4) Schwartz was unaware of any plan to commit that act of violence (i.e. the fire) or any other act of violence, and

(5) Schwartz did not know of any specific conversation between Ebbert and Sarkis which might be considered an extortionate threat.

An examination of the leading cases under 18 U.S.C. §894 in which the sufficiency of the evidence was in issue on appeal indicates that in none of them did the record reveal such a paucity of incriminating facts as found here. United States v Sclafani, 487 F. 2d 245 (2nd Cir. 1973), United States v Zito, 467 F. 2d 1401 (2nd Cir. 1972); United States v Bonanno, 467 F. 2d 14 (9th Cir. 1972), United States v Pizzi, 470 F. 2d 681 (3rd Cir. 1972) and United States v Burke, 495 F. 2d 1226 (5th Cir. 1974).

We submit that the evidence does not support Schwartz' conviction of Count Two. In addition, Count Two must fall in light of the acquittal of conspiracy, since the only acts of George and Ebbert for which Schwartz could be responsible would be those resulting from a conspiratorial agreement to threaten McGhee, with George and Ebbert's subsequent acts and words therefore chargeable to Schwartz. Having acquitted on conspiracy, Count Two must fall since Schwartz did not personally threaten McGhee prior to the fire and as noted above, had nothing to do with the fire.

## POINT III.

### THE ACTIVITIES WITH WHICH THE APPELLANT WAS CHARGED DO NOT COME WITHIN THE AMBIT OF 18 U.S.C. §894.

The statute under which the appellant Schwartz was indicted (18 U.S.C. §894), is part of the 1968 Consumer Credit Protection Act. A reading of the statute's legislative history leaves little, if any, doubt that Congress contemplated it as a weapon against the machinations of organized crime and not as a device to be used against legitimate business enterprises and/or businessmen such as the appellant. Nothing in the legislative history would indicate that Congress expected or desired the far reaching interpretation that the court postulated in the court below. In a section entitled "General Applicability," Congress stated:

> "The full utility of Chapter 42 as a weapon in the war on organized crime obviously cannot be assessed until it has been tested in battle. Some general observations, however, appear to be in order at this point. As noted above, it is not, and is not intended to be, a Federal usury law, nor does it have anything to do with interest rates as such. It is, rather, a deliberate legislative attack on the economic foundations of organized crime. Most of the business of the underworld, whether in loan sharking, gambling, drugs, 'protection,' or other activities, involves extensions of credit as defined in section 891 at one or more stages. The methods used in the enforcement of such obligations are notorious. Thus a very high proportion of underworld financial transactions fall within the ban of one or more of the provisions of chapter 42. It may very well develop that this chapter will find as much usefulness in the investigation and prosecution or transactions entirely within the

> world of organized crime as it does in those within the world [of organized crime] and those who are otherwise outside it. Be that as it may, the conferees wish to leave no doubt of the Congressional intention that chapter 42 is a weapon to be used with vigor and imagination against every activity of organized crime that falls within its terms." 1968 U.S. Cong. & Adm. News, p. 2029. (Emphasis added.)

This Court is presented with the unique opportunity to answer the question, what, if any, are the limits of §894? Are we going to allow §894 to be used as a weapon against legitimate businessmen; businessmen who have the right to collect unpaid and outstanding debts; businessmen who by law have been given self-help remedies? Or are we going to allow debtors to devise a new scheme to avoid paying their just obligations? Is the debtor's "new game in town" going to be (1) stop paying your debts; (2) go to the police or F.B.I. and tell them you are being threatened by the creditor; (3) visit or call the creditor, get into an argument with the creditor and tell the creditor he is threatening you; (4) tape the conversation; and (5) have him arrested and indicted pursuant to §894. This is exactly the situation in the case at bar. To this date there has not been a return of the property or appropriate payment to Gaines for the property by either McGhee or Taylor.*

Even though Congress intended §894 to be a weapon against the activities of organized crime, we are not unmindful of holdings in the Third, Seventh, Ninth and Tenth Circuit Courts of Appeals that prosecutions under Title 18 U.S.C.

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* Indeed, Taylor made an additional "touch" of $3,800, with the F.B.I. waiting down the block.

§894 are not limited to either "organized crime or loan sharking." However, each of these cases presents factual situations distinguishable from the case at bar.

In both United States v. Keresty, 465 F.2d 36 (3rd Cir. 1972), cert. den. 409 U.S. 991 (1972), and United States v. Andrino, 501 F.2d 1373 (9th Cir. 1974), the appellants were convicted for engaging in extortionate credit activities subsequent to gambling incidents. In Keresty, the appellant was owed $8,000 pursuant to a game of dice with one Louis Capo. After a number of payment demands failed, Keresty resorted to a series of bizarre strategies to secure payment. He introduced appellant Phillips to Capo as a representative of the "syndicate", which was untrue. After further demands for payment were made, accompanied by blatant verbal threats, Keresty again appeared at Capo's place of business and made further reference to syndicate involvement in financing his stake in the dice game, as well as its "displeasure" that Capo had been uncooperative. Against this unsavory background, Capo entered into a payment arrangement and after this agreement was finalized, Keresty once again warned Capo in no uncertain terms what would happen if payment was not made.

In Andrino, supra, various persons owed Andrino monies incurred pursuant to gambling activities they engaged in with Andrino. After he was unsuccessful in collecting these monies, Andrino verbally threatened each of the debtors. Furthermore, on one occasion, Andrino unsuccessfully attempted

to force one of the debtor's car off the road by side-swiping the debtor, an act which could have caused serious injury or death, if Andrino had been successful.

In United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974), a debt of $3,500 was due and owing a Brian Metrick by a third person, White. Thereafter, White was visited by the appellant Bean and Jeff Metrick, who stated that they had "taken over" the debt and were there to collect $7,000. When White disputed the amount various verbal threats were lodged against him, as well as his family. White then called Brian Metrick to find out if this was a joke. Assured that it wasn't, White, after contacting the F.B.I., had a series of meetings and conversations with the appellants and during each, White was verbally threatened by each appellant as to the consequences if he failed to pay.

In United States v. Briola, 465 F.2d 1018 (10th Cir. 1972), Briola was engaged in a bookmaking operation with two other persons. Donald Meyer worked for them as a phone man whose duty was to receive bets from customers and relay the information to the appellants (the partners). During his employment, Meyer placed a series of bets in a fictitious name and lost a considerable amount of money. A meeting was set up with the appellants and Meyer to discuss the repayment of these debts. At this meeting Meyer agreed to repay the monies in question but still received severe beatings by the appellants for his acts.

Each of the cases was cited by the government in its memorandum in opposition to Schwartz' motion to dismiss the indictment in the court below. Each of these cases was cited as controlling the application of §894 to the case at bar. However, each of these cases is clearly distinguishable form the case at bar. The appellant Schwartz was engaged in a legitimate business enterprise which engaged in a legitimate business activity - the leasing of automobiles and trucks, and not in unsavory or questionable activities such as gambling, as was the case in Keresty, Andrino, and Briola.

Moreover, the debts herein were debts incurred in the normal course of business and the amount due to this day is not in excess, as was the case in Andrino, to the actual amount that was due and owing Gaines at the time of the lease agreement; a debt which is still, to this day, unpaid. Furthermore, there was no direct activity by the appellant Schwartz. This conclusion can be seen directly from Judge Mishler's charge to the jury:

> "There is no proof in the record that the defendant Schwartz instructed Sarkis or anyone else to burn McGhee's garage or take any specific action or that he was aware of any plan to commit that act of violence or any other act of violence." (384a-385a)
>
> * * *
>
> "There is no proof whatever that Mr. Schwartz knew, was aware, that either Ebbert or Sarkis would commit arson, set fire to McGhee's garage. There is no proof that he knew of any specific conversation that either Ebbert or Sarkis

would indulge in the use of violence that might be considered an extortionate threat." (390a)

These findings by the court below clearly distinguish the appellant Schwartz from the appellants in all four cases the government cited as controlling the applicability of §894.

Thus the question at the outset of Point III was and still is: How far does §894 reach? Does it reach the activities of legitimate businessmen in their attempts to collect outstanding and unpaid debts? We respectfully submit that the answer should be negative! We are aware of the recent case of United States v Altese, 76-1008, slip op. 4629 (2nd Cir.; July 1, 1976). However, we would submit that such an interpretation as in Altese is not warranted herein. The statute in question in Altese (18 U.S.C. §1962) applies to "any" enterprise. The issue in Altese still revolved around organized crime and its attendant problems. The whole concept of "racketeering activities" clearly implies organized crime which is totally absent from the present case.

## CONCLUSION

For the reasons set forth herein, the judgment of conviction should be reversed and the indictment dismissed.

Dated: New York, New York
September 7, 1976

Respectfully submitted,

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Of Counsel

STATE OF NEW YORK )
) ss.
COUNTY OF NEW YORK)

Antonia Wells, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Bridgeport, Connecticut.

On September 7, 1976, deponent served the within three copies of the Brief for Appellant Jack Schwartz upon Assistant United States Attorney, Steven Kimelman, 225 Cadman Plaza East, Brooklyn, New York 11201. By depositing a copy in a depository of the United States Post Office.

Antonia Wells

Sworn to before me this
7th day of September, 1976

Ronald F. Poepplein

RONALD F. POEPPLEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-[illegible]3069
Qualified in [illegible] County
Commission Expires March 30, 1977